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No. 03-221

IN THE

Supreme Court of the United States

CHERYL K. PLILER,
Petitioner,
v.
RICHARD HERMAN FORD,
Respondant.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the dismissal of a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling.

2. Whether a second, untimely habeas petition may relate back to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus, including cases raising issues similar to the one presented here. *See Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

STATEMENT OF THE CASE

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court held that a "mixed" habeas petition – a petition raising both exhausted and unexhausted claims – should in most cases be dismissed "without prejudice," allowing the prisoner to exhaust state remedies and then return to federal court with a perfected petition. Fifteen years later, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which includes a one-year statute of limitations for the filing of federal habeas petitions. 28 U.S.C. § 2244(d)(1)(A). This case arises at the intersection of those

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[1] This brief is filed with the written consent of both parties. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

two rules, when the procedures endorsed by *Rose* for a return to federal court are threatened by the AEDPA limitations period. At issue are the efforts of the federal courts to preserve *Rose* and cases like it, and to ensure that application of *Rose* procedures under AEDPA does not have the unintended effect of forever foreclosing federal court review.

1. In 1988, respondent Richard Herman Ford ("Ford") was convicted in two separate state-court proceedings of first-degree murder and conspiracy to commit murder (the "Weed" case) and conspiracy to commit murder and attempted murder (the "Loguercio" case). Pet. App. 16, 18.[2] Ford was sentenced to life without the possibility of parole. Both convictions became final in 1993. *Id.* at 16, 19.[3]

2. On April 24, 1996, AEDPA became effective. Under AEDPA's one-year statute of limitations (as applied to convictions final before its passage) Ford was required to file any federal habeas petitions within one year of AEDPA's effective date, or by April 24, 1997. *See id.* at 21. On April 19, 1997, within AEDPA's one-year period, Ford submitted timely *pro se* federal petitions challenging his convictions in both the Weed and Loguercio cases (the "first petitions"). *Id.* at 16, 19. The filing of those petitions did not toll the AEDPA statute of limitations, which continued to run. *See Duncan v. Walker*, 533 U.S. 167 (2001).

3. By the time the magistrate judge issued reports on the petitions in August and September of 1997, the AEDPA statute of limitations had expired. Pet. App. 17, 20. The magistrate judge found that some, though not all, of Ford's claims in each of the cases were unexhausted, and gave Ford two options for proceeding. First, Ford could dismiss his unexhausted claims and proceed in federal court on his exhausted

[2] The appendix to the petition for certiorari is abbreviated as "Pet. App." All citations are to section A of the appendix.

[3] For a full description of the state court proceedings, *see* Respondent's Brief.

claims only. If Ford so chose, however, the magistrate judge indicated that it would "*not* later rule" on the claims yet to be exhausted, and would require Ford to file a statement "forever waiv[ing] his right to assert" the unexhausted claims "in the present habeas petition." J.A. 52 (emphasis in original).

Alternatively, the court would dismiss the entire mixed petition "without prejudice," so that Ford could return to state court to exhaust all of his claims. Pet. App. 17, 19. At this point, Ford expressed concerns about AEDPA's statute of limitations. J.A. 53. But the magistrate judge did not inform Ford that the AEDPA time period had run already and that as a result, absent grounds for equitable tolling, a dismissal "without prejudice" would leave Ford unable to bring any of his claims before a federal court. Pet. App. 14. Instead, the magistrate judge assured Ford that, as to the unexhausted claims, AEDPA's limitation period "begins to run only when the factual predicate of the claims could have been discovered through the exercise of due diligence." J.A. 53.

Under the magistrate judge's order, Ford was required to notify the court if and only if he wished to dismiss his unexhausted claims and proceed on the exhausted ones. The default presumption was thus that the court would dismiss the entire petition without prejudice.[4] After Ford did not timely respond, the magistrate judge recommended that both petitions be dismissed without prejudice. Pet. App. 17, 20.

Ford also filed, with both petitions, motions to stay the proceedings if it were determined that any of his claims were unexhausted, so that he could exhaust state remedies and then resume his federal action. *Id.* at 14. Under Ninth Circuit precedent, however, the magistrate judge could not stay mixed petitions; Ford would have to withdraw his unexhausted claims first. *Id.* at 17, 19. The magistrate judge did

[4] Any suggestion that Ford somehow failed to comply with the magistrate judge's instructions, *see* Petitioner's Brief ("Pet. Br.") at 5, is inaccurate. Here and throughout the habeas proceedings, respondent promptly and diligently followed court instructions in pursuing relief.

not inform Ford of that requirement, and the unexhausted claims thus remained in the petitions. *Id.* at 14. The magistrate judge recommended that Ford's stay motions be denied. *Id.* at 17, 19.

The district court adopted all of the magistrate judge's recommendations. The Loguercio petition was dismissed without prejudice on September 11, 1997, and the Weed petition on October 14, 1997. *Id.* at 17, 20.

4. After the dismissals, Ford acted quickly to exhaust all remaining claims. On September 29, 1997, 18 days after dismissal, Ford filed a state petition with the California Supreme Court seeking relief in the Loguercio case. *Id.* at 17. On October 24, ten days after dismissal of the Weed petition, Ford submitted his state habeas petition in that case. *Id.* at 20. On March 25, 1998, the California Supreme Court summarily denied both petitions. *Id.* at 18, 20.

5. Ford attempted to return to federal court exactly one week later, submitting petitions in both cases on April 1, 1998 (the "second petitions"). The state moved for dismissal on the ground that the second petitions were filed after AEDPA's April 24, 1997 cut-off date. Ford argued that he had diligently litigated his state petitions and second federal petitions, in reliance on the understanding that the initial dismissals "without prejudice" would allow him to return to federal court after exhausting his claims. Ct. App. Appellant's Rec. 540. The magistrate judge recommended dismissal of the second petitions as time-barred under AEDPA, and the district court agreed. Pet. App. 18, 21. As a result, neither the magistrate judge nor the district court ever examined the merits of Ford's petitions, including the nine concededly timely-filed and exhausted claims set forth in the initial Loguercio petition, J.A. at 43-53, and the five concededly timely-filed and exhausted claims set forth in the initial Weed petition, *id.* at 75-83.

6. In the decision below, the Ninth Circuit reversed. The court held, first, that the dismissals of Ford's initial petitions had been improper. Ford's decision "to have his timely-filed . . . petitions dismissed without prejudice was an uniformed one," the court found, because the magistrate judge had informed Ford neither of his option to withdraw his unexhausted claims and seek a stay nor of the time bar that he would face if the petitions were dismissed in their entirety. Pet. App. 15 And because the original dismissals were improper, the second petitions, insofar as they reasserted claims in the initial petitions, would "relate back" to the filing date of the initial petitions. *Id.* at 31.[5]

SUMMARY OF ARGUMENT

There is no indication that Congress, in enacting AEDPA, intended to foreclose federal review of the constitutional claims of prisoners who file timely but mixed petitions. Such an outcome would run contrary to this Court's own decisions, which protect the right of prisoners who file mixed petitions to return to federal court after presenting their claims to the state courts. It also would work a real injustice against *pro se* prisoners who file petitions that are timely under AEDPA, only to find that even a good-faith failure to exhaust one or more claims operates as an absolute bar to federal review of *any* of their claims.

Federal courts around the country have responded with stay procedures that allow them to hold federal proceedings in abeyance pending exhaustion, and to permit amendment with subsequently exhausted claims under Rule 15(c)'s "relation back" doctrine. Contrary to petitioner's broad-based attack, those stay procedures fall well within a district court's authority, and are entirely consistent with the dictates of AEDPA and this Court's decisions. They are a workable solution, leaving district courts with ample discretion to pre-

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[5] Claims raised only in the second petitions were treated differently. The court remanded five claims newly asserted in the second Weed petition for consideration of equitable tolling, and affirmed the dismissal of two claims newly raised in the second Loguercio petition. Pet. App. 35-39. Those claims are not at issue before this Court.

vent dilatory or abusive litigation tactics. And in a post-AEDPA world, they are the only sensible way to effectuate this Court's consistent holdings that a mixed petition does not foreclose post-exhaustion federal review.

ARGUMENT

I. A STAY PENDING EXHAUSTION EFFECTUATES THE ESTABLISHED RULE THAT THE FILING OF A MIXED PETITION DOES NOT FORECLOSE FEDERAL REVIEW.

A. This Court's Decisions Protect The Right Of A Prisoner Who Files A Mixed Petition To Return To Federal Court After Fully Exhausting His Claims.

1. The requirement that prisoners exhaust state remedies before federal habeas relief may be granted is not jurisdictional. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Strickland v. Washington*, 466 U.S. 668, 679 (1984). Rather, though it furthers important comity interests, the exhaustion doctrine creates only a "technical procedural" requirement. *Martinez-Villareal*, 523 U.S. at 645. As a result, this Court has consistently held that the failure to properly exhaust state remedies cannot "bar the prisoner from ever obtaining federal habeas review," *id.*, or "bar the prisoner from raising non-frivolous claims" that "a federal court [has] yet to review." *Slack*, 529 U.S. at 487. The exhaustion rule is not designed to "'trap the unwary *pro se* prisoner.'" *Rose*, 455 U.S. at 520 (citation omitted).

2. In a line of cases beginning with *Rose*, the Court has applied that principle to mixed petitions. In every one of those cases, the Court has held that a prisoner's initial failure to comply fully with the exhaustion requirement does *not* deprive him of an opportunity for federal review. On the contrary, the Court has insisted on procedures that protect the right of a prisoner to return to federal court after fully exhausting state remedies.

At issue in *Rose* was whether a federal court faced with a mixed petition could consider all of the claims, including those that were unexhausted. 455 U.S. at 519. The Court held that principles of comity forbid a federal district court from deciding claims that have not been presented to the state courts. *Id.* at 515, 519. At the same time, the Court carefully left open two alternate routes to federal court review. First, a prisoner seeking "speedy federal relief" could "delete the unexhausted claims" and proceed immediately in federal court on a now fully-exhausted petition, *id.* at 520 – but run the risk that a second federal petition raising newly exhausted claims might be dismissed under the "abuse of the writ" doctrine, *id.* at 521 (plurality opinion). Alternatively, a prisoner could ensure that all of his claims eventually would be heard in federal court by forgoing immediate review and opting instead for "total exhaustion." *Id.* at 522. To effectuate that choice, district courts were instructed to dismiss the entire mixed petition so that the prisoner could fully exhaust his state remedies *before returning to federal court* with one, now-perfected, petition. *Id.* at 514, 520. As this Court recently explained, dismissal under *Rose* always "contemplated that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U.S. at 486.

That right of return was safeguarded again in *Martinez-Villareal*. The question there was whether a federal habeas claim dismissed as "premature" and then reasserted when ripe could be barred as "successive" under AEDPA. 523 U.S. at 643. The Court held that there was no bar: "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied," and a habeas petitioner may return to federal court. *Id.* at 644. "To hold otherwise," the Court concluded, "would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.* at 645.

In *Slack*, the Court confirmed that dismissal of an initial mixed petition does not preclude federal review once all claims are exhausted. Rejecting the state's argument that any subsequent federal petition could be barred as "successive," the Court reaffirmed that prisoners who file mixed petitions may fully exhaust state remedies and then return to federal court for a hearing. 529 U.S. at 486-87 (under *Rose*, subsequent federal review may be precluded "only if a prisoner decline[s] to return to state court and decide[s] to proceed with his exhausted claims in federal court"). And under the "total exhaustion" option, claims not pressed in an initial petition may nevertheless be raised in a subsequent federal petition after the exhaustion anticipated by *Rose*. *Id.* at 487.

In sum, this Court has consistently construed governing habeas law to protect the right of a prisoner who files a mixed petition to return to federal court once he has fully exhausted state remedies. As the Court concluded in *Slack*, any other rule "would be contrary to our admonition that the complete exhaustion rule is not to 'trap the unwary *pro se* petitioner.'" *Id.* (quoting *Rose*, 455 U.S. at 520).

B. A Stay Is Necessary To Effectuate The Right To Return To Federal Court.

1. A procedure for staying federal proceedings on mixed petitions became necessary after AEDPA was enacted in 1996. When this Court adopted the "total exhaustion" rule in *Rose*, there was no statute of limitations for the filing of federal habeas petitions, and a prisoner seeking to file a second federal petition after fully exhausting state remedies faced no time bar. But AEDPA added to the mix a one-year statute of limitations, which in many cases would convert the procedures endorsed in *Rose* into a complete bar on federal review.

This case is a perfect example. There is no dispute but that Ford's first habeas petitions were timely filed under AEDPA. But the magistrate judge did not alert Ford, who was proceeding *pro se*, that his petitions included unexhausted claims until *after* the AEDPA limitations period had

expired. When Ford effectively opted for "complete exhaustion" under *Rose*, the district court dismissed his petitions without prejudice to post-exhaustion refiling. But by then, on petitioner's view, it was too late; the limitations period had run already, and despite the fact that Ford's initial petitions were timely filed and included exhausted claims, federal review of *all* of his claims was foreclosed.

There is nothing unique about Ford's case. As Justice Breyer explained in *Duncan v. Walker*, 533 U.S. 167, 186 (2001) (Breyer, J., dissenting), 57 percent of federal habeas petitions are dismissed for failure to completely exhaust state remedies. And on average, district courts take 268 days to dismiss petitions on procedural grounds. *Id.* That means that a prisoner who files a petition well *within* the AEDPA limitations period often will have his petition dismissed as mixed only *after* the period has expired – when, on the state's view, it will be impossible for him to file a subsequent perfected petition in federal court. Moreover, that outcome may have nothing to do with a prisoner's diligence and everything to do with which district court hears his case. "If Prisoner A and Prisoner B file mixed petitions in different district courts six months before the . . . limitations period expires, and the court takes three months to dismiss Prisoner A's petition, but seven months to dismiss Prisoner B's petition, Prisoner A will be able to return to federal court after exhausting state remedies, but prisoner B – due to no fault of his own – may not." *Id.*

2. It is not enough to say, as petitioner does, that a prisoner can avoid the problem simply by filing a fully exhausted petition the first time around. Pet. Br. 18-19. *Rose* and *Slack* protect the right of prisoners to federal review even after filing *mixed* petitions. And they do so because, as this Court has recognized, the exhaustion rule, though straightforward in the abstract, is very difficult to navigate in practice – especially for prisoners proceeding *pro se*.

Even the most diligent prisoner, for instance, may have difficulty identifying precisely which state remedies must be exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (applying exhaustion doctrine to requests for discretionary review). He may draft inartfully, so that a constitutional claim is not pressed with adequate specificity. *Compare Baldwin v. Reese*, 124 S. Ct. 1347, 1348 (2004) (prisoner failed to meet the "fair presentation" standard), *with id.* at 1352 (Stevens, J., dissenting) (state courts had "fair opportunity to assess respondent's federal claim"). Or he may file a state post-conviction petition that is procedurally deficient in some way – and thus lose the benefit of AEDPA's tolling provision for "properly filed" state pleadings. *See* 28 U.S.C. § 2244(d)(2).

The problem created by the interplay between *Rose*'s "total exhaustion" procedures and the AEDPA limitations period cannot be wished away by imagining a world in which good-faith litigants never file mixed petitions. Petitioner's position necessarily entails that some significant number of prisoners, acting with all due diligence, will file timely petitions including exhausted claims that can never be reviewed in federal court. The "total exhaustion" rule was never meant to operate as that kind of a "trap" for the "unwary *pro se* petitioner." *Slack*, 529 U.S. at 487 (quoting *Rose*, 455 U.S. at 520).

II. THE STAY PROCEDURES CHALLENGED BY PETITIONER ARE WELL WITHIN A DISTRICT COURT'S DISCRETIONARY AUTHORITY.

Fortunately, nothing in AEDPA or this Court's cases requires such a draconian result. As Justice Stevens explained in his concurring opinion in *Duncan*: "[A]lthough the Court's pre-AEDPA decision in [*Rose v. Lundy*] prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the

complete exhaustion of state remedies." 533 U.S. at 182-83. That solution has now been adopted by many of the federal circuit courts, and has proven workable. *See infra* at 21-23. And petitioner's scattershot arguments notwithstanding, such stays are entirely consistent with AEDPA and this Court's decisions.

A. Unexhausted Claims May Be Deleted By The Prisoner Or Dismissed By The Court.

Petitioner's opening contention is its most extreme: that faced with a mixed petition, a district court may not dismiss, or allow a prisoner to withdraw, unexhausted claims. Instead, the court must dismiss the petition in its entirety. Pet. Br. 17-19. The result, of course, would often be the same as in this case: AEDPA's limitations period would preclude a post-exhaustion federal petition and hence federal-court review of *any* of the prisoner's claims, even those that had been exhausted prior to an initial timely filing.

The State's position is flatly foreclosed by *Rose*. In that case, a majority of the Court expressly held that a prisoner who files a mixed petition is faced with the "choice of returning to state court to exhaust his claims *or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.*" 455 U.S. at 510 (emphasis added). The language relied on by petitioner – instructing dismissal of the entire petition for "total exhaustion" – governs only if the prisoner does not elect to withdraw his unexhausted claims. *Id.* at 509; *see also id.* at 514, 520 (majority opinion); *id.* at 520 (plurality opinion). Indeed, in other litigation, petitioner has conceded that *Rose* entitles a prisoner to delete unexhausted claims from a mixed petition. *See Calderon v. U.S. Dist. Ct.*, 134 F.3d 981, 986 (9th Cir. 1998) ("The State does not question the district court's authority to permit [the prisoner] to amend his original petition by deleting the unexhausted claims. Nor could it.").

In fact, the removal of unexhausted claims from a mixed petition is often handled more expeditiously, by having the

district court itself simply dismiss unexhausted claims without prejudice. *See, e.g., Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001). But whether a court employs that sensible procedure or requires a prisoner to delete unexhausted claims, the end result is the same. There is no merit to petitioner's contention that a mixed petition may not be "purged" of unexhausted claims.

B. A Mixed Petition, Once Purged Of Unexhausted Claims, May Be Stayed.

Petitioner's fall-back argument is that even if unexhausted claims may be excised from a mixed petition, whether by prisoner deletion or district-court dismissal, a district court is without authority to stay the now-perfected petition. Instead, petitioner insists, a court must immediately adjudicate the merits of a purged petition – so that by the time a prisoner has completely exhausted remaining claims, there will no longer be any federal proceeding to which those claims might "relate back" by amendment. Pet. Br. 19-20. Petitioner is incorrect. As the State has acknowledged before, there is no support – "specific" or otherwise – for the "assertion that district courts do not have authority to stay fully exhausted petitions." *Calderon*, 134 F.3d at 988 ("pressed at oral argument, the State [of California] was unable to muster any specific support" for its position).

1. District courts have inherent authority to issue stays in proceedings before them. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 146 (1919) (power to stay proceedings is "inherent in every court" retaining jurisdiction over an action); *Clinton v. Jones*, 520 U.S. 681, 683 (1997) (district court has "broad discretion to stay proceedings as an incident to control of its own docket").

There is nothing to suggest that courts do not enjoy the same inherent authority in the habeas context. Indeed, six Justices of this Court have already expressly or impliedly acknowledged a district court's power to stay federal proceedings pending complete exhaustion. *See Duncan*, 533 U.S. at 182 (Souter, J., concurring) ("nothing bars a district court from retaining jurisdiction pending complete exhaustion[]"); *id.* at 182-83 (Stevens, J., concurring) ("no reason" why district court should not "stay further proceedings" pending exhaustion); *id.* at 192 (Breyer & Ginsburg, JJ., dissenting) (referring to Justice Stevens' "sound suggestion" that courts stay mixed petitions pending exhaustion); *Martinez-Villareal*, 523 U.S. at 650 (Scalia & Thomas, JJ., dissenting) (noting that district court "did not hold" respondent's claim "in abeyance" when it denied his habeas petition). No Justice of this Court has expressed a contrary view.

Nor does a stay of a perfected petition offend *Rose* or the comity principles on which *Rose* is based. *Rose* holds that a federal district court may not *consider* a habeas claim before it has been fairly presented to the state courts. 455 U.S. at 515; *cf.* 28 U.S.C. § 2254(b)(1) (federal habeas petition may not be "granted" prior to exhaustion). It would be an affront to comity and state sovereignty, the Court has explained, for a "federal district court to upset a state court conviction without [affording] an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950). A *stay* of fully *exhausted* claims, on the other hand, is entirely consistent with *Rose* and does nothing to intrude on state prerogatives.

In fact, a stay of a mixed petition in its entirety is also fully consistent with *Rose*'s prohibition on adjudication of unexhausted claims. Whether or not a district court first dismisses unexhausted claims from a mixed petition, a stay of federal proceedings advances the principle that federal courts "should defer action," *id.*, while state courts consider the merits of a prisoner's claims in the first instance. At least

two federal courts of appeals have so held, authorizing district courts to stay mixed petitions in their entirety. *See Freeman v. Page*, 208 F.3d 572, 576 (7th Cir. 2000) (Easterbrook, J.); *Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004); *see also Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring) (suggesting that entire petition may be stayed). And that procedure has the added advantage of judicial economy: because all originally-filed claims are pending in abeyance, there is no need for a prisoner to amend his petition to add subsequently exhausted claims when he returns to federal court. *See Crews*, 360 F.3d at 154 n.5. But the Court need not decide in this case whether staying an entire mixed petition is permissible. It is enough here that a mixed petition may be purged of unexhausted claims, and that, once it is, a district court enjoys its customary authority to issue a stay.

2. Petitioner argues that a stay would "contravene[] this Court's admonition that federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" Pet. Br. 10, 23 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976)). But *Colorado River* and the principle it establishes apply when a district court *dismisses* an action and thus relinquishes federal jurisdiction. 424 U.S. at 810; *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (only under exceptional circumstances may federal court "deny[] a federal forum" by refusing to exercise jurisdiction). A stay, on the other hand, does not relinquish a court's jurisdiction; rather, the district court retains jurisdiction over the action while it is in abeyance. Accordingly, a stay does not violate any obligation of the federal courts to exercise their jurisdiction. "Unlike the outright dismissal or remand of a federal suit . . . an order merely staying the action does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition." *Quackenbush*, 517 U.S. at 721 (internal quotations omitted).

Petitioner's argument from *Colorado River* is not only incorrect but also inconsistent with her own position. It is petitioner, after all, who urges that a district court faced with a mixed petition must *dismiss* it outright and in its entirety – despite the fact that exhaustion is not a jurisdictional requirement, *see supra* at 6, so that this would constitute a relinquishment of the jurisdiction vested in the court. And it is most unlikely that petitioner would argue that *Rose* itself is in conflict with *Colorado River*, on the theory that it prevents district courts from ruling on unexhausted claims over which they have jurisdiction. Petitioner's reading of *Colorado River* is illogical as well as insupportable.

3. Petitioner also argues that a stay of a timely filed and fully exhausted petition is somehow prohibited by AEDPA. Pet. Br. 20-23. Nowhere in her brief, however, does petitioner identify a provision of AEDPA that actually precludes issuance of a stay. That is because there is none.

The two provisions of AEDPA at issue in this case are the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), and the rule that a federal habeas provision "shall not be granted unless it appears that," *inter alia*, "the applicant has exhausted the remedies available in the courts of the State," *id.* § 2254(b)(1). The stay procedure petitioner is challenging is not at odds with either of those provisions. That procedure may be invoked only when, as in this case, an initial federal petition is filed within the one-year period. And the issuance of a stay obviously does not constitute a pre-exhaustion "grant[]" of a federal petition prohibited by § 2254(b)(1). Nothing in AEDPA by terms overrides a district court's inherent authority to issue a stay, and that should be the end of the matter. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (where "statutory language provides a clear answer," inquiry is at an end).

Faced with a complete absence of textual support, petitioner falls back on a sort of hybrid policy-legislative history argument: that issuance of a stay is in practical tension with

the goal of the one-year statute of limitations, which is to "protect the federal system from being forced to hear stale claims." Pet. Br. 21 (quoting *Carey v. Saffold*, 536 U.S. 214, 216 (2002)). In other words, some extra-textual purpose of the statute of limitations may be thwarted if a claim, timely when filed, becomes stale before it is decided.

The actual provisions of AEDPA foreclose that position. Nowhere does the statute suggest that the passage of time between filing and decision may make a claim inappropriate for federal adjudication. On the contrary, AEDPA specifically provides for unlimited tolling of the statute of limitations while state post-conviction proceedings are pending, 28 U.S.C. § 2244(d)(2), making clear that Congress fully contemplated a substantial lapse of time between filing and adjudication. And there is nothing in *Carey* – the only case cited by petitioner – to suggest otherwise. *Carey rejects* the State of California's argument against tolling during certain portions of state habeas proceedings, 536 U.S. at 219-20, and provides no support for the idea that AEDPA's concern with "staleness" requires anything more than the filing of a timely petition.

Petitioner's argument also fundamentally misconceives the relationship between a stay of proceedings and a statute of limitations. On petitioner's view, a stay of proceedings is inappropriate if it would avoid what otherwise would be a time bar. But on this Court's view, the opposite is true: a stay may be appropriate precisely *because* it would avoid what otherwise would be a statute-of-limitations problem. *See, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (as between staying or dismissing an action in favor of parallel state proceedings, "a stay will often be the prefer[red] course, because it assures that the federal action can proceed without risk of a time bar"); *Deakins v. Monaghan*, 484 U.S. 193, 203 n.7 (1988) (approving stay because, "unless [the federal court] retained jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently

from asserting his claims in the federal forum by the running of the applicable statute of limitations").[6] Petitioner's theory – that a statute of limitations is by itself somehow at odds with exercise of a district court's inherent authority to stay an action – cannot be reconciled with this established law.

C. Subsequently Exhausted Claims May Be Added To A Stayed Petition By Way Of Amendment Under Rule 15.

Finally, petitioner argues that a district court may not allow amendment of a stayed petition with later-exhausted claims once the limitations period has expired. Pet. Br. 27-36. The question of amendment generally does not arise in circuits that allow for the stay of an entire mixed petition: if the district court has stayed both exhausted and unexhausted claims, there is no need for a prisoner to amend his original filing in order to have subsequently-exhausted claims from that petition considered when he returns to federal court. *See supra* at 13-14. But if a district court must dismiss unexhausted claims and stay only the remainder of the petition, then a stay without the possibility of amendment would be pointless: absent amendment, there would be no reason for a prisoner to seek a stay rather than pursue his exhausted claims immediately. In fact, petitioner is incorrect, and dis-

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[6] Federal circuit courts also have long held that when a timely-filed case suffers from a non-jurisdictional procedural defect, the appropriate course is to stay the action in order to avoid a time bar. *See, e.g., Burris v. Farley*, 51 F.3d 655, 659 (7th Cir. 1995) (Easterbrook, J.) (plaintiffs asserting employment discrimination claims and facing exhaustion requirements "may protect themselves by filing . . . in time to satisfy the statute of limitations and asking the district court to suspend proceedings" until additional claims can be exhausted and added to original complaint); *Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973) ("In cases where the state agency has been bypassed, the district court should retain jurisdiction for a period sufficient to allow the employee to seek redress through the state agency.").

trict courts may, in their discretion, permit amendment of stayed petitions through Rule 15(c).[7]

1. Petitioner's sole argument against use of Rule 15(c) to permit post-exhaustion amendment is that Rule 15(c) does not apply to habeas proceedings at all. Pet. Br. 30-36. The text of the federal habeas statute says otherwise. Section 2242 – which petitioner fails even to mention – speaks directly to the issue, and it provides that an "[a]pplication for a writ of habeas corpus . . . may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. The "rules[] of procedure" that governs amendments is Rule 15. Under the plain terms of § 2242, that rule applies in ordinary habeas cases.[8]

This is not a controversial point. The courts of appeals that have considered the issue unanimously agree that Rule 15(c) applies to habeas cases. *See, e.g.*, *Dean v. United States*, 278 F.3d 1218, 1222 (11th Cir. 2002); *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 815-16 (2d Cir. 2000) (Calabresi, J.); *United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333, 337 (3d Cir. 1999); *United States v. Craycraft*, 167 F.3d 451,

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[7] This normal operation of Rule 15(c) – under which the relation-back rule permits amendment of a petition that is still pending by virtue of a stay – is different from the use of Rule 15(c) when the initial petition has been dismissed. The latter issue, which arises in the decision below in a very limited context, is addressed *infra* at 28-29.

[8] Section 2242, *see* Pub. L. No. 80-773, 62 Stat. 869, 965 (1948), predates enactment of AEDPA. But there is no provision in AEDPA that repeals or modifies § 2242 in ordinary habeas cases. And when Congress intended to modify application of Rule 15 in the habeas context, it did so expressly: AEDPA does provide for a specially "strict standard" for amendment in a limited class of capital cases qualifying for "expedited review." Petitioner cannot account for Congress' considered decision to restrict application of Rule 15 and the relation-back doctrine in one and only one narrow category of cases. *See Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) (Rule 15's "liberal standard for amendment" applies in habeas cases outside statutorily defined group of capital cases eligible for expedited review).

456-57 (8th Cir. 1999). Petitioner does not cite a single case supporting her contrary view.

2. With an argument contrary to plain text and absent any case-law support, petitioner again argues that the very existence of AEDPA's statute of limitations precludes use of the relation-back doctrine to permit amendments outside the limitations period. Pet. Br. 30-36. That makes no sense. The entire purpose of the relation-back rule is to allow for amendments that would otherwise be barred by a statute of limitations; that is precisely the situation to which Rule 15(c) is addressed. *Id.* at 30; *see also* 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1497 (1990) ("[T]he rationale of the relation back rule is to ameliorate the effect of the statute of limitations . . . ."). If the existence of a statute of limitations is *per se* inconsistent with use of Rule 15(c) to allow post-expiration amendment, then Rule 15(c) has no practical application at all – in the habeas or any other context.

Petitioner relies heavily on the unremarkable fact that many of AEDPA's sponsors believed that a one-year statute of limitations would help to address the delays then prevalent in habeas litigation, especially in capital cases. Pet. Br. 32-35. That does nothing to distinguish AEDPA's statute of limitations from the limitations periods in most civil statutes – and thus nothing to cabin the implications of petitioner's position for Rule 15(c). And to the extent Congress was concerned generally with delay, it addressed those concerns by requiring that federal habeas petitions be filed within a year. Application of Rule 15(c), which permits "relation back" only to a timely-filed petition, is entirely consistent with that requirement.

Whether Rule 15(c) applies to habeas cases is a question of statutory construction resolved by the plain terms of § 2242. Even if there were some tension between that provision and the statute of limitations, the more specific commands of § 2242 would control. *See, e.g.*, *Morales v. Trans-*

TransWorld Airlines, Inc., 504 U.S. 374, 384 (1992) ("the specific governs the general" in statutory construction). Petitioner's position – which would bar even the most technical and helpful of amendments, like those to more clearly state the basis for a federal claim – was not adopted by Congress.

3. The only real question here, which petitioner alludes to elsewhere in her brief, Pet. Br. 19, arises from the fact that some of the claims raised in Ford's second petitions were not raised in his first. *Slack* makes clear that a federal court is not categorically barred from considering claims raised in a second petition that were not pressed in an initial mixed petition but were subsequently exhausted. 529 U.S. at 487-88. It seems to follow that a district court may permit relation-back of the same category of claims: those exhausted after dismissal of a mixed petition and then presented for the first time to a federal court.[9] But there is no need to decide that question here. The decision below applies the relation-back doctrine only to those claims pressed in Ford's *first* petitions. Pet. App. 35. Claims newly raised in the second petitions were disposed of on different grounds and are not now before the Court. *Id.* at 36-39; *see supra* at 5 n.5.

III. THE STAY PROCEDURES CHALLENGED BY PETITIONER ARE SENSIBLE AND WORKABLE.

As shown above, rigid application of *Rose*'s "total exhaustion" procedure, combined with AEDPA's one-year statute of limitations, threatens the well-established principle that a prisoner who timely files a mixed petition may refile a perfected one after exhausting state remedies. As also demonstrated, there is no indication – textual or otherwise – that Congress actually intended that result. *See also Duncan*, 533 U.S. at 183 (Stevens, J., concurring) (referring to "reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdic-

[9] The court's exercise of discretion in considering such an amendment would be guided by ordinary standards under Rule 15(c).

tion within the 1-year interval prescribed by AEDPA"). Faced with that problem, the lower courts have crafted a solution, in the form of stay procedures, that protects the continued vitality of cases like *Rose*, *Martinez-Villareal*, and *Slack* without overstepping district court authority. That solution is sensible and workable, and far preferable to any of the alternatives that would likely emerge in its absence.

1. Petitioner's brief may create the impression that these stay procedures are wholly a Ninth Circuit phenomenon. That is not so. In fact, as described below, it is the Ninth Circuit's failure to *fully* adopt the stay procedures used elsewhere that led to the precise contours of the decision below. At least five other circuits, on the other hand, have adopted the more standard stay procedures put at issue by petitioner.

The basic contours of the rule are the same from circuit to circuit. A district court faced with a mixed petition has the authority to hold the federal proceedings in abeyance, either by staying the whole petition or by dismissing unexhausted claims and staying the remainder. Where the court dismisses unexhausted claims, it may permit the prisoner to reinstate those claims, once they are exhausted, by way of amendment under the "relation back" doctrine. The authority to stay, like the authority to permit amendment, is discretionary. But if AEDPA's limitations period is likely to bar the filing of a perfected petition after exhaustion, then denial of a stay generally will constitute an abuse of discretion. In other words, a stay will be "preferable" in many cases and will be "the only appropriate course . . . where an outright dismissal could jeopardize the timeliness of a collateral attack." *Zarvela*, 254 F.3d at 380 (internal quotation omitted); *see also Freeman*, 208 F.3d at 576 (Easterbrook, J.); *Nowaczyk v. Warden*, 299 F.3d 69, 79 (1st Cir. 2002); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Crews* , 360 F.3d at 152.[10]

[10] The Eighth Circuit has rejected that authority and taken the contrary view. *See, e.g., Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003).

2. Petitioner worries that it may be difficult for judges to determine whether the AEDPA limitations period will expire before a prisoner can exhaust state remedies and return to federal court. Pet. Br. 24. In the large number of cases like this one, of course, the inquiry will be straightforward: if the limitations period has run *before* the district court addresses the exhaustion issue, then the judge can be certain that AEDPA will present a time-bar problem for any future federal filings. And even in cases in which it is less obvious whether AEDPA will threaten a prisoner's ability to return to federal court, the marginal imposition on district judges is insubstantial. Under *Rose*, those judges already are charged with determining whether each claim presented has been fully exhausted, a complicated question that requires review of the entire record of proceedings. Answering the statute of limitations question should require little additional work.

3. Petitioner's more sustained criticism is that stay procedures encourage undue delay and abusive litigation. Pet. Br. 32-33, 35-36. But non-capital petitioners like Ford – the vast majority of habeas petitioners – have no incentive whatsoever to engage in dilatory tactics. For non-capital prisoners, the point is to move as quickly as possible toward potential relief through federal-court adjudication of a fully exhausted petition. *See Rose*, 455 U.S. at 520 (prisoner's "principal interest, of course, is in obtaining speedy federal relief on his claims").

In any event, there are ample means of preventing vexatious litigation of the sort the State hypothesizes. First, AEDPA itself checks abusive litigation practices by permitting district courts to dismiss even mixed petitions on the merits if they raise insubstantial claims. 28 U.S.C. § 2254(b)(2); *see Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring). Concerns that prisoners will prolong federal stays by "running out the clock" with repeated state filings are addressed by the states' own procedural rules. *See Slack*, 529 U.S. at 489 (states "remain[] free to impose proper procedural bars to restrict repeated returns to state court for post-conviction proceedings").

Perhaps most important, discretionary stay procedures give district courts the flexibility they need to prevent vexatious or repetitive litigation. Though granting a stay ordinarily will be appropriate when a post-exhaustion filing otherwise would be time-barred, district courts may deny a stay or permission to amend when a prisoner has not exercised reasonable diligence. *See Zarvela*, 254 F.3d at 380-81. They may also, in their discretion, condition or limit their stays and the amendments they will allow. If a prisoner may be contemplating the filing of multiple mixed petitions, for instance, then a district court can grant a stay but order that the prisoner present only fully exhausted claims in his next federal pleading, on pain of dismissal with prejudice. *See Slack*, 529 U.S. 489. If the state would be unfairly prejudiced by amendment under the relation-back doctrine, then the court can deny leave to amend. *See supra* at 20 n.9. If a court is worried that a prisoner will unduly delay pursuing state remedies, then it can put time limits on its stay. In the Second and Sixth Circuits, for example, a stay pending state exhaustion is ordinarily conditioned on the prisoner's initiation of exhaustion within 30 days, and a return to federal court within 30 days after exhaustion is completed. *Zarvala*, 254 F.3d at 381; *see Palmer*, 276 F.3d at 781 (approving Second Circuit approach). This list is not exhaustive. The point is that stay procedures, rooted in the equitable power and sound discretion of district courts, allow for a case-specific approach that precludes abusive tactics without foreclosing federal review for diligent and good-faith litigants.[11]

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[11] Petitioner suggests that a stay pending exhaustion would have the same effect as tolling AEDPA's statute of limitations during federal proceedings, contravening *Duncan*. Pet. Br. 35-36. But the discretionary nature of the stay procedures at issue distinguishes them importantly from automatic operation of a tolling provision. In any event, of course, the majority in *Duncan* did not comment at all on the stay procedure endorsed by Justices Stevens and Souter. *See* 533 U.S. at 181 (reserving questions);

4. The stay procedures adopted by lower courts respond to a real problem. If for some reason they were unavailable, then other responses would take their place. And the most likely alternatives would raise serious concerns that the stay procedures do not.

The alternative that petitioner appears to endorse, for instance, would require that at the same time a prisoner files a federal petition, he also file a "protective" petition in state court in order to trigger AEDPA's state-court tolling provision. Pet. Br. 18 n.5 (citing *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003)). The idea, it seems, is that if petitioner can run out his "protective" state proceedings – and the concomitant tolling – long enough, there will still be time to refile in federal court after a dismissal of a mixed petition. *Id.* It is hard to square that suggestion with petitioner's concerns about comity. By encouraging prisoners to waste the time of state courts in order to take advantage of a tolling provision, and requiring state courts to adjudicate claims that may well be exhausted already, petitioner's proposal undermines comity principles.

Less troubling on comity grounds, but still wildly inefficient, is an alternative that would shift the burden to the district courts. If those courts cannot stay exhausted claims in mixed petitions, then represented prisoners may be advised to "take precautionary measures to guard against . . . being penalized [if] the district court judge takes a long time to rule upon the exhaustion status of the petition." 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 5.2b (4th ed. 2001). Specifically, prisoners could ask district courts for immediate emergency rulings on exhaustion, and seek equitable tolling if such rulings are not forthcoming. *Id.* Even assuming that district courts could and would act quickly on such requests, the procedure, as its

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id. at 182 (Stevens, J., concurring) (conclusions "unaffected by [majority] decision construing a single provision of [AEDPA]").

proponents acknowledge, would be "cumbersome and time-consuming," at the expense of the federal courts. *Id.*

Another route is the one actually taken by the Ninth Circuit which, as noted above, has adopted stay procedures slightly different from those used in other circuits. In the Ninth Circuit, a district court is permitted neither to stay an entire mixed petition nor to dismiss unexhausted claims on its own. Instead, unexhausted claims may be purged, and remaining claims stayed, only if the prisoner himself requests withdrawal of the unexhausted claims. *See Calderon*, 134 F.3d at 986; Pet. App. 22. The end result will in many cases be the same (though with the unnecessary expenditure of substantial resources by both prisoner and court). But because the prisoner must initiate the process, the question of advisements arises: how much must the district court or magistrate judge tell the prisoner about his withdrawal option? Pet. App. 24-25. That issue – the narrow one addressed below – is avoided altogether by the more common stay procedure, in which the district court simply presents the standard *Rose* options and then may itself stay the action if the prisoner chooses to pursue complete exhaustion.

IV. THIS COURT SHOULD AFFIRM THE DECISION BELOW.

1. For the reasons given above, this Court should reject petitioner's broad-based attack on the stay procedures adopted by the lower courts, and hold that a district court faced with a mixed petition and a looming or expired AEDPA deadline ordinarily should stay the federal proceedings and then, if necessary, permit amendment under the relation-back doctrine after exhaustion of state remedies. Under that rule, the decision below should be affirmed.

As noted above, the Ninth Circuit employs slightly different stay procedures than other circuits. But the court below has adopted the basic position that a district court may stay federal proceedings – by allowing a prisoner to delete unexhausted claims, and then holding the remainder of the

petition in abeyance – and may allow post-exhaustion amendment under Rule 15(c). *See Calderon*, 134 F.3d at 989; Pet. App. 23-24. The decision below amounts to a holding that the district court in this case erred by failing to grant Ford's stay motions, given that Ford otherwise would be time-barred when he attempted to return to federal court after fully exhausting state remedies. Pet. App. 25 ("granting a stay is 'the only appropriate [remedy] where an outright dismissal could jeopardize the timeliness of a collateral attack'") (quoting *Zarvela*, 254 F.3d at 380).

If, as *amicus* urges, the Court endorses the stay proceedings challenged by petitioner, then that holding is surely correct. Nothing about Ford's case would have taken it out of the ordinary rule that a stay should be granted when the one-year limitations period would otherwise prevent post-exhaustion review. On the contrary, Ford acted with due diligence throughout his habeas proceedings. He filed timely habeas petitions that included exhausted as well as unexhausted claims. In reliance on the magistrate judge's assurances that dismissal would be "without prejudice," he promptly initiated further state post-conviction proceedings, and then promptly returned to federal court when exhaustion was completed. Even under a 30-day conditioned stay like the Second Circuit's, *see supra* at 23, Ford – who filed in state court within three weeks of the federal dismissal, and in federal court again one week after exhaustion – would be entitled to have his petitions reviewed.

The court below correctly held that the district court erred when it failed to hold Ford's exhausted claims in abeyance pending exhaustion, and then permit amendment of the stayed petition to include the now-exhausted claims. Pet. App. 23-26. The Court should affirm on those grounds.

2. Even if the Court rejects the stay procedures at issue, it should affirm the decision below. Under *Rose*, it should be clear beyond dispute that respondent was entitled to delete his unexhausted claims from his mixed petition and to proceed with his exhausted claims. *Supra* Part II.A. But as the court below correctly held, even that limited right is meaningful in a post-AEDPA world only if a *pro se* prisoner is advised that his other "choice" – dismissal of the entire petition for complete exhaustion – may preclude federal review of any of his claims. Pet. App. 27-30.

The magistrate judge purported to give Ford a choice: either withdraw his unexhausted claims and proceed only on the exhausted ones, or the court would dismiss his petitions in their entirety and "without prejudice" so that he could fully exhaust. But at the time the magistrate judge so instructed, there was really no choice at all. The AEDPA limitations period had expired, so that (absent equitable tolling) federal review of *all* of Ford's claims – including those already exhausted – would be forever precluded if his petitions were dismissed. As the Ninth Circuit concluded, the magistrate judge's offer of a dismissal "without prejudice" misled Ford into believing that dismissal for complete exhaustion was a viable alternative to proceeding with his unexhausted claims only. Pet. App. 27-28.[12]

This Court should affirm the Court of Appeals' holding that a magistrate or district judge must advise a prisoner of a potential AEDPA time-bar in order to make the prisoner's choice a meaningful one. *Id.* at 29-30. That holding is con-

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[12] That error was compounded when the magistrate judge made dismissal of the entire petition appear to be the preferred course of action. First, the magistrate judge cast the alternative – deleting unexhausted claims – in a decidedly negative light, stating that he would "not later rule" on unexhausted claims, and going so far as to require that Ford formally waive any rights to assert those claims. J.A. 52. Then, in response to Ford's express concerns about the AEDPA time bar, the magistrate judge suggested that the statute of limitations on at least some of Ford's claims had not run. J.A. 53 (limitation period "begins to run only when the factual predicate of the claims could have been discovered through the exercise of due diligence"). Finally, by presenting the choice so that complete dismissal was the default to which Ford had to object, Pet. App. 17, 20, the magistrate judge likely conveyed that dismissal was the norm.

sistent with this Court's own decisions, which recognize that certain straightforward advisements will sometimes be necessary in habeas cases so that *pro se* prisoners can make informed judgments and do not inadvertently forfeit their rights. *See Castro v. United States*, 124 S. Ct. 786, 791-92 (2003) (district court may not recharacterize *pro se* litigant's motion as habeas petition without first informing litigant of its intent, warning that subsequent petitions will be subjected to "second or successive" restrictions, and providing litigant with opportunity to withdraw or amend filing). It imposes no substantial burden on district courts; *Rose* already requires a colloquy with prisoners and, as noted above, identifying time-bars will add little incremental burden. *Supra* at 22. And without such an advisement, prisoners like Ford will regularly and through no fault of their own be completely deprived of federal court review of timely-filed and exhausted constitutional claims. *See Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) ("Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty.").

The Court also should affirm the Court of Appeals' holding that Ford was entitled to relief for the improper dismissal of his first petitions without the necessary advisements. Pet. App. 31-33. Properly understood, the court's decision regarding Rule 15(c) was an extremely narrow one, tailored to the particular remedial problem raised by this case: Because the magistrate judge dismissed Ford's first petitions "without prejudice" and led Ford to believe he could return to federal court upon exhaustion, Ford had no reason to appeal those dismissals. Other courts of appeals facing the same circumstances – a first petition improperly dismissed, a justifiable failure to appeal, then a second time-barred petition – have invoked their inherent power to provide equitable relief. Some have simply treated the district court's dismissal of the initial petition as though it never happened, so that the petition is still "pending" for relation-back purposes, *see Zarvela*,

254 F.3d at 377, 383; others have applied the equitable doctrine of *nunc pro tunc*, under which the perfected petition is treated as though it were filed on the date of the initial petition, *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000). The use of Rule 15(c) below is to precisely the same effect, and equally consistent with the courts' inherent authority to grant equitable relief.

Contrary to petitioner's suggestion, Pet. Br. 37-38, the Court of Appeals' Rule 15(c) decision does not have broad application. We are aware of no case in the Ninth Circuit applying that holding beyond its facts: where there has been an improper and prejudicial dismissal of a first habeas petition, and the prisoner had no way of knowing that an appeal was in order. Indeed, petitioner has cited no other case at all employing the remedial device used below. And if this Court now instructs district courts faced with mixed petitions to stay rather than dismiss when a return to federal court would otherwise be time-barred, then there should be no further need for this or any other remedy.

3. At a minimum, this Court must remand for consideration of equitable tolling. The Court of Appeals noted that "[a]lthough we need not reach the question here, Ford would also be entitled to relief under equitable tolling principles." Pet. App. 35 n.15. As set forth in the *amicus curiae* brief of the Federal Defenders in the Ninth Circuit, AEDPA is plainly subject to equitable tolling, and Ford presents a textbook case for application of the rule. *See* Br. of Fed. Defenders in the Ninth Cir., *Amici Curiae*, in Supp. of Respondent; *supra* at 23, n.11. If the Court does not affirm the decision below, then it should remand to give the Ninth Circuit an opportunity to rule on the issue.[13]

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[13] Though petitioner makes a passing argument against equitable tolling, Pet. Br. 26, that issue is not properly before the Court. Presumably because the lower court did not rule on the question, petitioner did not include equitable tolling in the questions presented in its certiorari petition, *see* Cert. Pet. i, and did not even mention the issue in the petition itself.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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Petitioner has waived any right to argue against equitable tolling in this Court.